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No. 74-415

In the Supreme Court of the United States

OCTOBER TERM, 1974

FRANCIS A. RONDEAU,

Petitioner,

vs.

MOSINEE PAPER CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Warren Burger, Chief Justice of the Supreme Court of the United States and Associate Justices of the United States:

This is a petition by Francis A. Rondeau for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit entered in the case of Mosinee Paper Corporation v. Francis A. Rondeau, et al.; judgment was entered on July 16, 1974.

OPINIONS BELOW

The opinions and orders below are as follows: the opinion and order of the Western District of Wisconsin, filed February 13, 1973 (Appendix A, *infra,* page App. 1); the opinion of the Court of Appeals on review of the Western District of Wisconsin's order, filed July 16, 1974 (Appendix B, *infra,* page App. 23). The District Court opinion and order are reported at 354 F.Supp. 686 (E.D| Wis., 1973); the Circuit Court opinion is not yet officially reported.

JURISDICTION

The decision of the Court of Appeals was entered on July 16, 1974. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Did the Court of Appeals correctly decide that a showing of irreparable harm was not a prerequisite to granting injunctive relief under §13(d) of the Securities and Exchange Act of 1934, 15 U.S.C. §78m(d)?

II. Did the Court of Appeals correctly decide to reverse the District Court and to grant equitable relief against a technical violation of §13(d) more than a year and a half after a proper Schedule 13(d) was filed, with no proxy solicitation or tender offer having occurred in the interim?

STATUTES AND RULES INVOLVED

15 U.S.C. §78aa provides as follows:

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all

> suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.
>
> June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

15 U.S.C. § 78m(d) provides as follows:

> (d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified

mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank, shall not be made available to the public;

(C) If the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

(E) information as to any contracts, arrangements or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(d)(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(d)(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(d)(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(d)(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice

stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(d)(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of any equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control or the issuer or otherwise as not comprehended within the purposes of this subsection.

Fed. R. Civ. Pro. 65(b) provides as follows:

(b) *Temporary Restraining Order; Notice; Hearing; Duration.* A temporary restraining order may be granted without written or oral notice to the adverse

party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

STATEMENT OF THE CASE

Respondent, Mosinee Paper Corporation (hereinafter "Mosinee"), the plaintiff below, is a Wisconsin corporation engaged in the business of manufacturing, converting and selling specialty papers, paper products and plastics. Its principal office is at Mosinee, in Central Wisconsin. It has manufacturing facilities at Mosinee, Green Bay and Columbus, Wisconsin. Mosinee's only class of equity security outstanding and registered pursuant to section 12 of the Securities Exchange Act of 1934 is common stock, of which there were 806,177 shares outstanding as of August 31, 1971; 40,309 shares would constitute five percent of the outstanding shares.

Petitioner, Francis A. Rondeau (hereinafter "Rondeau"), a resident of Mosinee, Wisconsin, is president and general manager of Mosinee Cold Storage, Inc.; president of Wausau Cold Storage Company, Inc.; vice president and a director of Francis Rondeau, Inc.; president and a director of Rondeau Foundation; and a limited partner of Rondeau & Company. Rondeau and the aforementioned corporations were defendants below. Rondeau's business activities include the cold storage business, banking and a variety of investments.

Between April 5, 1971 and August 4, 1971 petitioner, Rondeau, purchased 66,577 shares of stock in respondent, Mosinee. On July 9, 1971 respondent's stock register indicated that petitioner controlled more than 5% of its issued and outstanding stock. It was not until July 30, 1971 that petitioner realized that due to changes in the law he was required to file a Schedule 13(d) because he had acquired more than 5% of the stock in respondent. Upon learning of this requirement Rondeau placed no further

orders for that corporation's stock, and he retained counsel to prepare the proper schedule which was duly filed on August 25, 1971.

Fearing Mr. Rondeau would attempt to take control of it, respondent, on the basis of the §13(d) violation, brought an action seeking to prevent petitioner from buying more shares of respondent's stock, voting the shares he already had, or seeking to gain control of the corporation; the complaint also sought damages in an unspecified amount and further sought to force divestiture of an unspecified number of the corporation's shares. Jurisdiction in the court below was based on 15 U.S.C. §78aa. The issues were joined, discovery was taken, and petitioner, Rondeau, defendant below, moved for summary judgment. The District Court granted that motion because it found no danger of irreparable harm existed as to the respondent corporation, and because it found petitioner's violation of §13(d) to be the result of unintentional oversight, rather than intentional covert, and conspiratorial conduct. The respondent corporation appealed.

On appeal the United States Court of Appeals for the Seventh Circuit, in a split decision (two to one), reversed the District Court. The grounds for reversal were: 1) that no danger of irreparable harm was necessary for injunctive relief under §13(d); and 2) that violation of §13(d) in and of itself mandated injunctive relief against the violator regardless of the reasons for the violation. The dissenting judge voted to affirm the trial court.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Other Caselaw of Another Court of Appeals.

The decision of the Court of Appeals for the Seventh Circuit as to granting relief against a 13(d) violation, even when no deliberate, covert and conspiratorial conduct has been shown, is in conflict with a decision of the Court of Appeals for the Eighth Circuit on the same question, in the case of *Tri-State Motor Transit Co.* v. *National City Lines,* No. 73-867 (April 4, 1974), unreported.

The Court of Appeals for the Seventh Circuit's holding that proof of violation of §13(d) without more requires the granting of equitable relief creates a precedent which not only conflicts with caselaw in another circuit, but which also creates for the statute, itself granting no remedy, a lower threshold for imposition of penalties than exists in similar areas of securities law. Even the Securities and Exchange Commission, the agency charged with primary responsibility for enforcing securities law, is not entitled to injunctive relief unless it proves there is a reasonable expectation of future violations, *S.E.C.* v. *Culpepper,* 270 F.2d 241 (2nd Cir. 1959), *S.E.C.* v. *Universal Service Association,* 106 F.2d 232 (7th Cir. 1939), see also *U.S.* v. *W. T. Grant Co.,* 345 U.S. 629 (1953). The Court of Appeals for the Seventh Circuit decision therefore grants to a private party a power for relief hitherto denied even the S.E.C. By ordering equitable relief under §13(d) without at least a showing of a danger of recurrent violation the Seventh Circuit has placed itself in conflict with its own prior caselaw, and the standard body of law on this issue throughout the federal judiciary.

II. The Case Presents an Important Question Which Should Be Settled By This Court.

The decision of the Court of Appeals for the Seventh Circuit as to the immateriality of proof of irreparable injury before injunctive relief may be granted for a §13(d) violation involves an important question of federal law and procedure which has not been, but should be, settled by this Court. It also raises serious questions concerning the viability of a long standing general body of law.

A showing of irreparable harm has traditionally been considered an essential prerequisite to issuance of the equitable remedy of injunction, *e.g. Sellers* v. *Regents of University of California,* 432 F.2d 493 (9th Cir., 1970), *cert. den.* 401 U.S. 981 (1971); *Reed Enterprises* v. *Corcoran,* 354 F.2d 519 (D.C. Cir., 1965); *Ozark Air Lines, Inc.* v. *Cox,* 326 F. Supp. 1113 (E.D. Mo., 1971). This cornerstone of equitable law should not be overturned. If the Court of Appeals' decision remains standing, shareholders of the same corporation will be subject to different interpretations of the same law in different circuits. Moreover, it would constitute a *sub rosa* reversal of established general equitable practice in the Seventh Circuit.

In the past, this Court has been careful to maintain uniformity in the construction of the federal rules of practice, particularly when those rules are uncodified. *Hickman* v. *Taylor,* 329 U.S. 495 (1947). The decision of the Circuit Court in the present case requires exercise of this Court's power to maintain uniformity with regard to the equitable grounds for injunctive relief.

III. The Decision Below Probably Conflicts With The Applicable Caselaw of This Court.

The decision of said Court of Appeals that proof of irreparable injury is not a prerequisite to granting of injunctive relief, is in conflict with applicable caselaw of this Court, *i.e. Beacon Theatres* v. *Westover,* 359 U.S. 500 (1959); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 54 U.S. (13 How.) 518 (1851).

As noted above, irreparable injury has traditionally been a prerequisite to granting an injunction on a private cause of action. This Court has been a leader in establishing that tradition through its promulgation of rules of procedure, Federal Rule of Civil Procedure 65(b), and its decisions, *Beacon* v. *Westover, supra; Cameron* v. *Johnson,* 390 U.S. 611 (1968), *Locomotive Engineers* v. *M.-K.-T. R. Co.,* 363 U.S. 528 (1960). The decision of the Circuit Court in the present case is contrary to the spirit and letter of this Court's actions in the area of injunctive relief.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for certiorari should be granted.

Respectfully submitted,

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Dated October 11, 1974

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MOSINEE PAPER CORPORATION,
a Wisconsin corporation, Plaintiff,

v.

FRANCIS A. RONDEAU, MOSINEE COLD STORAGE, INC., a Wisconsin corporation, FRANCIS RONDEAU, INCORPORATED, a Wisconsin corporation, WAUSAU COLD STORAGE COMPANY, INC., a Wisconsin corporation, RONDEAU FOUNDATION, a Wisconsin non-stock, non-profit corporation, RONDEAU & COMPANY, a Wisconsin limited partnership, GEORGE RONDEAU, FIRST WISCONSIN NATIONAL BANK OF WAUSAU, a Wisconsin corporation, and FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, a Wisconsin corporation,

Defendants.

OPINION AND ORDER
71-C-335
(Filed February 13, 1973)

This is a civil action brought under the Securities Act of 1934, as amended. Plaintiff alleges that defendants have violated §§ 13(d) and 14(c) of the Williams Act, 15 U.S.C. §§ 78m(d) and 78n(e), and §10(b) and Rule 10b-5 of the Securities and Exchange Act, 15 U.S.C. §78j(b), 17 C.F.R. §240.10b-5. Plaintiff has requested an injunction restraining defendants from voting any common stock of plaintiff held or acquired in violation of the Securities Exchange Act, from using such stock as collateral to secure funds

for the purpose of acquiring control of plaintiff, and from acquiring additional common stock of plaintiff until the effects of defendants' violations have been fully dissipated. Plaintiff has also demanded that defendants be required to divest themselves of all or some of defendants' shares of plaintiff's common stock, acquired in violation of the Act. Plaintiff finally requests damages for injuries sustained as the result of defendants' illegal activities. Jurisdiction is present under 15 U.S.C. §78aa. Defendants First Wisconsin National Bank of Wausau and First Wisconsin National Bank of Milwaukee have filed a motion to dismiss. Plaintiff moved for a preliminary injunction but subsequently said motion was voluntarily withdrawn. A motion for summary judgment in favor of all of the defendants is presently before this court.

I find and conclude that there is no genuine issue of material fact as to the propositions contained in the section of this opinion entitled "Facts."

FACTS

Plaintiff, Mosinee, is a Wisconsin corporation having its principal place of business at Mosinee, Wisconsin, where it is engaged in the business of manufacturing, converting and selling specialty papers, paper products and plastics. Its only class of equity security outstanding and registered pursuant to Section 12 of the Securities Exchange Act, 15 U.S.C. §781, is common stock, of which there were 806,177 shares outstanding as of August 31, 1971.

Plaintiff, in recent history and until 1970, had increasing sales and profits. It had a decline in earnings in 1970 and in the first quarter of 1971. In the spring of 1971, the directors of Mosinee reduced its dividend.

The president of the plaintiff is Clarence Scholtens; the Chairman of the Board of Directors is John E. Forester. Collectively, Mr. Forester, who has a law degree

but who does not practice law as his occupation, his wife, and trusts established by Mr. and Mrs. Cyrus Yawkey and Mr. Aytchomonde P. Woodson (son-in-law of the Yawkeys) are the largest stockholder of the plaintiff corporation. Mr. Forester is a director of many corporations.

Defendant Francis A. Rondeau, a resident of Mosinee, Wisconsin, is president and general manager of defendant Mosinee Cold Storage, Inc.; president of defendant Wausau Cold Storage Company, Inc.; vice president and a director of defendant Francis Rondeau, Inc.; president and a director of defendant Rondeau Foundation; and a limited partner of defendant Rondeau and Company. Rondeau's formal education ended upon graduation from high school. His present activities include the cold storage business and a variety of investments.

Defendants Mosinee Cold Storage, Francis Rondeau, Inc., and Wausau Cold Storage Company, are Wisconsin corporations having their principal places of business in Wisconsin. Defendant Rondeau Foundation is a Wisconsin nonstock nonprofit charitable corporation with its principal office in Wisconsin. Defendant Rondeau & Company is a Wisconsin limited partnership with its principal place of business in Wisconsin. It is composed of one general partner, defendant George Rondeau and nine limited partners, including defendant Francis Rondeau.

Defendant George Rondeau, a resident of Wisconsin and son of defendant Francis Rondeau, is manager, treasurer, and director of defendant Wausau Cold Storage Company, and is general partner of defendant Rondeau & Company.

Defendants First Wisconsin National Bank of Wausau and First Wisconsin National Bank of Milwaukee are Wisconsin corporations with their principal places of business in Wisconsin.

In the winter of 1971, Mr. Francis Rondeau (hereinafter "Mr. Rondeau"), who was considering investing in plaintiff corporation, openly expressed the opinion on a number of occasions that the plaintiff's stock was a good investment. He made his first purchase in his own name, on April 5, 1971, of 500 shares at $12.50 per share. This initial purchase was registered on the books of the plaintiff's stock transfer agent on April 28, 1971. By May 17, 1971, Mr. Rondeau had acquired a total of 40,413 shares of plaintiff's common stock. It was not until July 9, 1971, however, that plaintiff's stock register indicated that Mr. Rondeau and the other defendants herein were record owners of more than 40,309 shares. (I find that given the 806,177 shares of stock outstanding, it requires approximately 40,309 shares to constitute 5% of the issued and outstanding stock of the plaintiff.) From April 5, 1971, through August 4, 1971, the defendants acquired a total of 66,577 shares of stock.

In April, 1971, both Mr. Scholtens and Mr. Forester learned that Mr. Rondeau had made several purchases of plaintiff's stock. By June 1, 1971, the plaintiff was aware that Mr. Rondeau was president of both the Mosinee and Wausau Cold Storage companies. When Mr. Rondeau's holdings reached 18,000 shares on the plaintiff's records, Mr. Scholtens contacted Mr. Rondeau by telephone, welcoming him as a new substantial shareholder and inquiring into his purpose in purchasing shares. Mr. Rondeau stated that he felt the stock was underpriced and was a good investment; that he intended to continue to purchase shares and might acquire up to 40,000 shares (under 5% of the outstanding stock); and that he was "perfectly happy with the operation."

Mr. Orr, an employee of Forwood, Inc., a corporation presided over by Mr. Forester, and which provides management, accounting, and investment services to the majority shareholders of plaintiff, kept a cumulative total

of acquisitions by Mr. Rondeau during 1971; he reported this total to Mr. Forester upon request.* (*=IN CAMERA)

I find that Mr. Rondeau did not know that he was required to file a Schedule 13D under the Williams Act when his holdings exceeded 5% until he consulted his attorney on or about July 30, 1971, immediately after receiving a letter from Mr. Forester stating that Rondeau's activity in plaintiff's stock may have created problems under the Federal Securities Laws. (In July, Mr. Rondeau's holdings of plaintiff's stock had exceeded 60,000 shares.) Mr. Rondeau had his accountants work continuously thereafter to provide the information needed for the 13D Schedule. Mr. Rondeau placed no further orders for plaintiff's stock after July 30, 1971, although some previously placed orders were filled in August, 1971. He filed his first 13D Schedule on August 25, 1971; on September 2, 1971, this action was commenced; on September 29, 1971, an amendment and supplement to defendants' first 13D Schedule was filed.

Mr. Rondeau had been advised in the past that he didn't need to file anything with the SEC until his holdings of any one company exceeded 10%, which had been the law until December of 1970, when the Securities and Exchange Act was amended to reduce the requirement in Section 13(d)(1) from 10% to 5%. 15 U.S.C. §78m(d)(1). Mr. Forester was also unfamiliar with the requirements of the Williams Act until a few days before he wrote the letter to Mr. Rondeau, which is dated July 30, 1971.

I find that during July, it was common knowledge, "street talk" among brokers, bankers, and business men in the community, that Mr. Rondeau was purchasing plaintiff's stock in substantial quantities. Rumors that Mr. Rondeau was purchasing stock began as early as June, but were vague with respect to the extent of the purchases.

In late 1970, Mr. Forester, for himself, his wife and five of the trusts he managed, decided on the basis of a security

analyst's recommendation to invest trust assets in the paper industry. Purchases of the plaintiff's stock began at that time but were discontinued in April, 1971, because of an unusual opportunity to purhase a large block of stock in another paper company. However, that opportunity did not materialize, and some portion of the cash accumulated for the first investment was instead invested in plaintiff's stock in late July.* Beginning July 30, 1971, the same day that Mr. Forester had communicated by letter with Mr. Rondeau, and for the next four trading days, Mr. Forester and the trusts he managed purchased over 20,000 shares of plaintiff's stock (not an unusual volume of transactions for the trusts involved).

Although any time a party purchases a substantial portion of a corporation's outstanding stock it is possible to infer that the purchaser is interested in obtaining control, I find that there is no concrete evidence in the record warranting a finding that Mr. Rondeau seriously considered obtaining control of the plaintiff corporation prior to the time that he conversed with his attorney by telephone, after receiving Mr. Forester's letter of July 30, 1971. I find that Mr. Rondeau and the other defendants did not engage in intentional covert, and conspiratorial conduct in failing to timely file the 13D schedule.

I find that Mr. Rondeau's purchases of plaintiff's stock has created concern on the part of the plaintiff's present management, some of the plaintiff's employees and some shareholders with respect to the consequences of a possible tender offer and subsequent change in control of the company, e.g. the future relationship that Mr. Rondeau might have with the Board, with long-time customers, and with trade unions. I further find that this anxiety may have been somewhat worsened by the rumors about Mr. Rondeau's intentions which resulted from his failure to articulate his purposes in a timely 13D Schedule.

Although the total amount of shares purchased was correctly stated in Mr. Rondeau's 13D Schedule filed on August 25, 1971 (66,577 shares), the allocation of shares among the Rondeau entities shown on said 13D Schedule was inaccurate. The record ownership of these shares is correctly reflected in the defendants' amendment of the 13D Schedule, filed on September 29, 1971:

	Number of Shares of Record and Beneficially
Francis A. Rondeau	34,679
Mosinee Cold Storage, Inc.	11,020
Francis Rondeau, Incorporated	7,060
Wausau Cold Storage Company, Inc.	3,600
Francis A. Rondeau Foundation, Incorporated	1,957
Rondeau & Company	4,600
Ronco	264
Mosiness Cold Storage, Inc., Wausau Cold Storage Company, Inc., and Francis Rondeau, Incorporated, as participating Employers in The Emjay Corporation Master Profit Sharing Plan dated October 14, 1968	3,397
	66,577

Item 3 of Schedule 13D requires a statement as to the filer's source and amount of funds or other consideration:

> State the source and amount of funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading the securities, a description of the transaction and the names of the parties thereto. 33 F.R. 11,016 (July 30, 1968) as amended by 33 F.R. 14,110 (Aug. 30, 1968).

In the 13D Schedule filed August 25, 1971, Mr. Rondeau described the sources of his funds as set out fully in the margin.[1] In the amendment filed September 29, 1971, Rondeau further amplified the sources of funds as set out in the margin.[2]

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[1] All purchases of the Issuer's common stock made to date have been financed as follows:

1. Approximately $598,000 from Francis A. Rondeau of which approximately $300,000 came from Mr. Rondeau's own funds and the remainder borrowed from Rondeau & Company on open account.

2. Mosinee Cold Storage, Inc. borrowed $30,000 from the First Wisconsin National Bank of Wausau on a 90-day note at 5¼% secured by certain securities owned by it and related companies named herein. This loan has been repaid.

3. Francis Rondeau, Incorporated borrowed $100,000 from the First Wisconsin National Bank of Wausau on a 90-day note at 5¼% secured by certain securities owned by it and related companies named herein. This loan has been repaid.

4. Rondeau & Company borrowed $307,000 from the First Wisconsin National Bank of Milwaukee at an annual interest rate of 6% secured by certain securities owned by it and related companies named herein. This loan has been repaid.

NOTE: Of the funds identified in 1 to 4 above, approximately $865,500 was utilized to purchase common stock of the Issuer and the balance used to make purchases of securities of other corporations.

Francis A. Rondeau and one or more of his controlled corporations and other entities presently are considering investing approximately $3,600,000 of additional funds in the common stock of the Issuer. These funds are expected to be obtained as follows:

(a) $1,200,000 to be invested by Mosinee Cold Storage, Inc., out of proceeds to be received from the sale of real property located in Marathon County, Wisconsin; such transaction is expected to close within the next 12 months;

(b) Francis A. Rondeau and his associates propose to sell approximately $1,000,000 of marketable securities to provide additional funds for investment in common stock of the Issuer;

(c) The balance of the monies, if invested, will be borrowed although no commitments for any such borrowings or loans have been entered into or have gone beyond the negotiation and discussion stage.

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[2] 1. With respect to Item 3, the undersigned, Mosinee Cold Storage, Inc., and Francis Rondeau, Incorporated, now state and aver that no part of the proceeds of loans received from First Wisconsin National Bank of Wausau as referred to in paragraphs 2 and 3 of said Item 3 were utilized for the purchase of common stock of the Issuer. However, it has now been determined that Mosinee Cold Storage, Inc. borrowed $50,000 on May 11, 1971, from First Wisconsin National Bank of Wausau at 5½% interest, secured by certain securities, certificates of deposit and insurance policies owned by it and related companies named in the Schedule 13D, and Wausau Cold Storage Company, Inc. borrowed $50,000 on June 29, 1971, from First Wisconsin National Bank of Wausau at 5½% interest, secured by certain securities, certificates of deposit and insurance policies owned by it and related companies named in the Schedule 13D. An undetermined portion of the proceeds of these loans were advanced by said corporations to Francis A. Rondeau and used by him to purchase shares of common stock of the Issuer. Both of the aforesaid loans have been fully repaid.

2. Further, with respect to Item 3, the undersigned, Rondeau & Company borrowed the aggregate sum of $307,000 at 6% annual interest from First Wisconsin National Bank of Milwaukee between May 10, 1971, and July 20, 1971, of which approximately $187,000 was used to purchase common stock of the Issuer in the name of Rondeau & Company and of Francis A. Rondeau and Francis A. Rondeau, Nominee. The above loans were secured by the collateral pledge to said Bank of shares of common stock of the Issuer and of other securities owned by Francis A. Rondeau and/or his associates identified in this Amended Schedule 13D. The loans from First Wisconsin National Bank of Milwaukee were paid, in full, on August 27, 1971, with proceeds received by Francis A. Rondeau and/or his associates from the sale of securities other than shares of common stock of the Issuer.

3. Further, with respect to Item 3, Francis A. Rondeau states and avers that subsequent to August 9, 1971, he has had discussions

(Footnote continued)

About August 15, 1971, Mr. Rondeau sold 10,000 First Wisconsin Bankshares, which had a market value of $32/share or a total value of $320,000, to Mr. Tom Werner, pursuant to an agreement whereby Mr. Rondeau had the right to repurchase the shares within twelve months at his option, at the price of $32,000, plus interest at the rate of approximately 6%. I find that whether this sale with an option to repurchase is denominated a sale or a loan, Mr. Rondeau had no obligation to disclose this transaction in the 13D Schedule as the cash realized from the transaction was not obtained for the purpose of buying plaintiff's stock nor was it in fact so disbursed. I further find that Item 3 of the 13D Schedule, as amended, is adequate and does not contain misrepresentations of fact.

A few days after Mr. Rondeau's August 25, 1971, Schedule 13D was received by the plaintiff, plaintiff wrote to each of its shareholders and issued a press release calling attention to Mr. Rondeau's statement that he was considering a tender offer. For a few days after this press release, plaintiff's stock was quoted as high as $19-21/share. Within a few days it dropped back to the $12.50-$14 range, where it remained.

OPINION

Plaintiff first opposes defendants' motion on the grounds that there are genuine issues of fact which are

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(Footnote continued)

with representatives of First Wisconsin National Bank of Milwaukee and Marine National Exchange Bank of Milwaukee relative to he and/or his associates obtaining loans for the purchase of additional shares of common stock of the Issuer. No commitment or agreements relative to any such borrowing has been received or entered into.

unresolved; more particularly, that there is a genuine issue as to whether defendants' conduct was intentional, covert and conspiratorial and as to whether the 13D Schedule, filed by Rondeau, both in its original and amended form, misstates facts concerning his sources of financing purchases of plaintiff's stock. As set out in the above section entitled "Facts," I have made findings from the record herein on both of these issues in favor of the defendants.

Plaintiff also opposes defendants' motion for summary judgment on the grounds that the defendants have not established that they are entitled to judgment as a matter of law. The parties moving for summary judgment must not only establish that the material facts are not in dispute, but must also demonstrate that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(e). All inferences are to be drawn against the movant and in favor of the party opposing the motion. 3 *Barron & Holtzoff, Federal Practice and Procedure* §1234.

Section 13(d) of the Securities and Exchange Act provides in part:

> Any person, who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered . . . is directly or indirectly the beneficial owner of more than 5 percentum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office . . ., send to each exchange where the security is traded, and file with the Commission, a statement containing such information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. . . . 15 U.S.C. §78m(d)(1).

In the instant case, the defendants admit that by failing to file a 13D Schedule by May 27, 1971, they violated the filing requirements of the Williams Act, 15 U.S.C. §78m. Defendants further urge, however, that because a legally sufficient 13D Schedule was subsequently filed, and in the absence of a deliberate, covert conspiracy to take over the plaintiff corporation, plaintiff is not entitled to any relief in this action. Defendants submit that an analysis of the language of §13(d) of the Securities and Exchange Act, of the legislative history of the Act and of the judicial interpretation of the statute reveals: (1) that §13(d) is a "notice statute," without provision for sanctions and that the requirement of notice has been satisfied by the late filing in the instant case; (2) that in the absence of deliberate and covert noncompliance with the requirements of the Act, and in the absence of a showing by the plaintiff of irreparable harm, the equitable relief requested by the plaintiff is inappropriate; and (3) that the imposition of sanctions in the instant case would constitute a misapplication of the Williams Act as a barrier to stockholders' democracy, perpetuating entrenched management without majority support.

The plaintiff contends that the violation conceded by the defendants warrants injunctive relief; that the plaintiff is not, as a matter of law, required to prove "irreparable injury" as an element of its claim for equitable relief; and that an appropriate injunction can be fashioned to meet the circumstances of this case.

The complaint alleges that plaintiff has suffered irreparable harm as a result of the defendants' failure to timely file the 13D Schedule. However, the plaintiff has not directed this court's attention to any evidentiary material

in the voluminous record which would support a finding of irreparable harm. Although the defendant has the burden of proof upon a motion for summary judgment, the plaintiff may not rest upon the mere allegations of his pleadings to establish that there is a genuine issue of fact. Fed. R. Civ. P. 56(e). The defendant here has introduced testimony by both the President and the Chairman of the Board of the plaintiff corporation indicating that the damage sustained by the plaintiff from Mr. Rondeau's activities in general and his late filing of the 13D Schedule in particular, stems from the anxiety of its employees and shareholders about a possible future change in control of the corporation. Absent any other evidence, I must conclude that the plaintiff has not suffered "irreparable harm."

Although one court has stated in dicta that the absence of irreparable harm does not necessarily preclude injunctive relief where the public interest is involved (here the plaintiff asserts the public interest in private enforcement of the federal securities laws and in deterrence of noncompliance with disclosure requirements), *Sisak* v. *Wings & Wheels Express, Inc.*, 1971 CCH Fed. Sec. L., Rep. §92,991 at 90,670 (S.D.N.Y. 1970), other courts have expressly stated that a finding of irreparable harm is a prerequisite to injunctive relief. *See Ozark Airlines, Inc.* v. *Cox*, 326 F. Supp. 1113, 1118-1119 (E.D.Mo. 1971).

Judge Kaufman's analysis of the history and purposes of §13(d) is helpful in deciding what relief is appropriate for violations of the Act followed by subsequent compliance:

> The 1960's on Wall Street may best be remembered for the pyrotechnics of corporate takeovers and the phenomenon of conglomeration. Although individuals

seeking control through a proxy contest were required to comply with section 14(a) of the Securities Exchange Act and the proxy rules promulgated by the SEC, and those making stock tender offers were required to comply with the applicable provisions of the Securities Act, before the enactment of the Williams Act there were no provisions regulating cash tender offers or other techniques of securing corporate control. According to the committee reports:

> "The [Williams Act] would correct the current gap in our securities laws by amending the Securities Exchange Act of 1934 to provide for full disclosure in connection with cash tender offers and other techniques for accumulating large blocks of equity securities of publicly held companies." S. Rep. No. 550 at 4; H.R. Rep. No. 1711 at 4, U.S. Code Cong. & Admin. News p. 2814.

Specifically, we were told, "the purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time." S. Rep. No. 550 at 7; H.R. Rep. No. 1711 at 8, U.S. Code Cong. & Admin. News p. 2818. Otherwise, investors cannot assess the potential for changes in corporate control and adequately evaluate the company's worth. *See generally* Comment, Section 13(d) and Disclosure of Corporate Equity Ownership, 119 U. Pa.L.Rev. 853, 854-55, 858, 865-66 (1971).

> That the purpose of section 13(d) is to alert the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control is amply reflected in the enacted provisions.

GAF Corporation v. *Milstein*, 453 F.2d 709, 717 (2nd Cir. 1971). The history of the Act, however, also clearly

reveals that §13(d) was not enacted to provide protection for management against raiders, as there is substantial disagreement as to whether tender offers and stock acquisitions in pursuit of control constitute a desirable and healthy aspect of stockholder democracy. *GAF Corporation* v. *Milstein*, 324 F. Supp. 1062, 1069-1070 (S.D.N.Y. 1971), *rev'd in part, aff'd in part*, 453 F. 2d 709 (2nd Cir. 1971). *See* H.R. Report No. 1711 at 4, U.S. Code Cong. & Admin. News p. 2811-2821. *See also Bath Industries* v. *Blot*, 427 F.2d 97, 109 (7th Cir. 1970).

Even without concluding that irreparable harm is a prerequisite to relief, it would seem that the instant case provides a particularly inappropriate occasion to fashion equitable relief for the plaintiff. First, the only harm documented is the "anxiety" which could be expected to accompany any change in management, a predictable consequence of shareholder democracy. Congress, in enacting the Williams Bill, attempted to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. H.R. Report No. 1711, *supra* at 2813. Secondly, the record here does not reveal that the defendants engaged in a secret conspiracy to accumulate stock from unsuspecting shareholders before exposing their intention of gaining control in a 13D Schedule. Instead, the record indicates that defendants openly purchased substantial quantities of stock, that management and other brokers and businessmen were aware of these purchases, and that the defendants promptly complied with the Williams Act soon after becoming aware of the filing requirements and after their plans to attempt to obtain control crystallized. Finally, I note that all of the information required by the Williams Act has been available to both stockholders and management since Sep-

tember 29, 1971, and the record does not reveal that the defendants have proceeded with a tender offer.

The plaintiff cites the following passage from *Bath, supra,* to support its argument that the late filing of defendants' 13D Schedule neither cures nor vindicates the purpose of §13(d):

> If defendant-appellants were in fact required to file statements . . . sometime near midsummer of 1969, the filing of 13D Schedules in October, 1969, may well be insufficient to cure the failure to file earlier. The purpose of the filing and notification provisions is to give investors and stockholders the opportunity to assess the insurgents' plans before selling or buying stock in the corporation. It additionally gives them the opportunity to hear from incumbent management on the merit or lack of merit of the insurgents' proposals. If the defendant-appellant's late filing is sufficient, then no insurgent group will ever file until news of their existence and plan leaks out and prompts a law suit. By that time it will be too late to avoid the evils which the Williams Act is designed to eliminate. *Bath, supra* at 113.

Although this language is broad and sweeping, it should be noted that the Court of Appeals in *Bath* was affirming the trial court's decision to grant a preliminary injunction, and emphasized that in this area, where a federal statute creates legal rights and only a general right to sue, the discretion of a district court to fashion remedies is broad. *Bath, supra* at 113.

Furthermore, the facts in *Bath* are distinguishable from the instant case. First, it must be noted that the trial court found that the plaintiff sustained irreparable injury as a result of the defendant's failure to timely file a 13D Schedule. *Bath Industries, Inc.* v. *Blot,* 305 F. Supp. 526, 537-

539 (E.D. Wis. 1969); *Bath, supra* at 104. In *Bath,* the defendants conspired and agreed to obtain control of the corporation either by threat of or by a proxy battle, timed to coincide with the expected award of a large governmental contract for which the corporation had been actively contending. Such a proxy fight would severely limit the corporation's chances of being awarded the contract and might consequently cause permanent and irreparable harm. Therefore, unlike here, in *Bath,* irreparable injury to the corporation, as distinguished from its present management, flowed from the covert conduct of the defendants, who secretly accumulated stock and solicited allies so that at the appropriate time they could confront management with a *fait accompli.* Plaintiffs in *Bath* clearly demonstrated that had the defendants filed a timely 13D Schedule, management would have been able to better protect the corporation from losing the contract. Furthermore, at the time of ruling on the preliminary injunction the trial court in *Bath* had not yet determined whether defendants had ever filed an adequate 13D Schedule. The court granted a preliminary injunction to "remain in effect until it is determined that the 13(d) statements that have been or will be filed by the defendants are legally sufficient." *Bath Industries, Inc.* v. *Blot,* 305 F. Supp. 296, 539. In the instant case I have found that the 13D Schedule filed is adequate.

The plaintiff also brings to my attention the decision in *Committee for New Management of Butler Aviation* v. *Widmark,* 335 F. Supp. 146 (E.D.N.Y. 1971). In that case, the court granted a preliminary injunction as relief for defendant's cross-motion asserting that one of the plaintiffs had violated §13(d). However, the *Butler Aviation* case is distinguishable from the instant case in three ma-

terial respects: first, the plaintiff there concealed his purchases of stock through the use of nominees so that his ownership did not appear on the corporation's stock transfer records; second, the plaintiff in *Butler Aviation* never filed the required 13D Schedule; and finally, the court's decision in that case immediately preceded the annual meeting of the company's shareholders, so there was no opportunity, as here, for the shareholders to be apprised by management of the information which should have been disclosed to them by the party accumulating stock by filing the 13D Schedule.

For these reasons, I conclude that although the plaintiff has established that the defendants have violated §13 (d) of the Williams Act, the plaintiff is not entitled to equitable relief.

The plaintiff claims that the defendants' failure to file a 13D Schedule also violates §§14(e) and 10(b).

Section 14(e) provides in part:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. 15 U.S.C. §78n(e).

Neither the plaintiff nor the defendants assert that Rondeau has made a public tender offer. Nonetheless the plaintiff contends that the phrase "tender offer" should be construed to include the defendants' series of buy orders prior to the filing of the 13D Schedule in the relatively

limited market for the plaintiff's stock. Furthermore, the plaintiff contends that the phrase "in connection with" is broad enough to encompass situations in which a tender offer is being considered.

The plaintiff concedes that it has no authority in point for either of these rather novel propositions. If the plaintiff's contention is based upon the alleged misstatement within the 13D Schedule as finally filed, I note the statement of the district court in *GAF Corp.* v. *Milstein,* 324 F. Supp. 1062 (S.D.N.Y. 1971), that §14(e) was not intended to cover fraudulent misstatements in a §13(d) filing when there has been in fact no public tender offer. *Id.* at 1073. On appeal the Court of Appeals indicated in a footnote that the tender offer transactions covered by §14(e) are distinguishable from §13(d) dealings and that the statutory scheme is as follows: §14(d), 15 U.S.C. §78n(d), requires disclosure by tender offerors; §14(e), 15 U.S.C. §78n(e), the companion section for §14(d), declares that it is illegal to make false and misleading statements in connection with a §14(d) tender offer; §13(d), 15 U.S.C. §78m(d), requires disclosure of acquisition of ownership by any direct or indirect means; and Congress has not enacted a parallel section, equivalent to §14(e), for §13(d). Nonetheless, the Circuit Court concluded that "the obligation to file truthful statements is implicit in the obligation to file with the issuer and *a fortiori,* the issuer has standing under §13(d) to seek relief in the event of a false filing." *GAF Corporation* v. *Milstein,* 453 F.2d 709, 720n.22 (2nd Cir. 1971).

Whether I conclude that relief for false statements in 13D Schedules is afforded under §14(e) as suggested by plaintiff or is implicit in §13(d) as held by the 2nd Circuit, the plaintiff here is not entitled to relief on the basis

of this contention, as I have found that the 13D Schedule, as amended, does not contain misrepresentations of material fact nor misleading statements.

I also conclude that plaintiff's assertion that defendants' failure to timely file a 13D Schedule is in itself a fraud and deceit under §14(e) does not justify affording the plaintiff the relief requested. Under plaintiff's construction of §14(e), the purchaser of stock "in connection with any tender offer" would, in order to avoid committing fraud, have the same responsibility for prompt filing as is required both under §13(d) and §14(d). Even assuming that this rather bizarre construction of these sections in this overlapping manner is correct, I conclude that the restraints upon the granting of equitable relief implicit in the legislative history of §13(d) and in the case law interpreting that section would also have to be applied to cases arising under §14(e). Otherwise a defendant's liability would depend upon the plaintiff's arbitrary choice of sections and the purposes of the Williams Act might well be frustrated. As discussed *supra,* I conclude that the plaintiff is not entitled to equitable relief either under §13(d) or §14(e).

The plaintiff also asserts that the defendants have violated Section 10(b) and Rule 10b-5. 15 U.S.C. §78j(b); 17 C.F.R. §240.10b-5. Section 10(b) provides:

> It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 is as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Even assuming that the plaintiff's construction of §10 (b) is proper, i.e. that either the filing of a misleading 13D Schedule or the failure to timely file a 13D Schedule violates §10(b), as admitted by plaintiff in its brief there is serious question as to whether an issuer has standing to invoke §10(b) for injunctive relief, when it has neither purchased nor sold securities. The plaintiff cites Judge Friendly's comment in *General Time Corporation* v. *Talley Industries, Inc.,* 403 F.2d 159, 164 (2nd Cir. 1968): "we would not want to place our approval on a holding that under no circumstances can an issuer have standing to seek an injunction [under Section 10(b)]." Nonetheless, plaintiff has not cited any cases which would indicate that it does have standing under the circumstances of the instant case. In *Superintendent of Insurance* v. *Banker's Life & Casualty Co.,* 404 U.S. 6, 13n.10 (1971), the United States Supreme Court expressly refused to

decide whether an issuer has standing under §10(b) where the corporation was not a seller or buyer.

I conclude that in the instant case, where management is clearly involved in a fight for control of the corporation, it is inappropriate to afford the corporation standing to sue under the rationale that it is desirable to provide a means, in addition to the Commission, to assure private enforcement of the Commission's rules and regulations, promulgated to protect the integrity of the marketplace and individual investors:

> It is generally inappropriate to impede a legitimate fight for the control of the management of a corporation. Where the corporation management faces a conflict of interest, and no direct connected interest of the corporation is to be vindicated by the suit, the protection of the objects of Rule 10b-5 through equitable intervention is better left to be administered by the federal administrative agency, the SEC, or other eligible complainants." *GAF* v. *Milstein,* 324 F. Supp. at 1072; *aff'd* 453 F.2d at 721.

Therefore, I conclude that the plaintiff does not have standing to assert the §10(b) claim.

I further conclude that this decision in favor of all the defendants renders the motion to dismiss filed by two of the defendants moot and that consequently said motion to dismiss must be denied.

Accordingly, on the basis of the entire record herein, It Is Hereby Ordered That the motion to dismiss is denied and that the motion for summary judgment in favor of all defendants is granted.

Entered this 13th day of February, 1973.

By The Court:
/s/ *James E. Doyle*
District Judge

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 73-1277

MOSINEE PAPER CORPORATION, a Wisconsin Corporation,
Plaintiff-Appellant,

v.

FRANCIS A. RONDEAU, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 71 C 335
JAMES E. DOYLE, *Judge.*

Argued January 23, 1974 — Decided July 16, 1974

Before SWYGERT, *Chief Judge,* PELL, *Circuit Judge,* and PERRY, *Senior District Judge.**

SWYGERT, *Chief Judge.* Plaintiff Mosinee Paper Corporation appeals from the grant of summary judgment

* Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

entered in favor of defendants Francis A. Rondeau and various persons and entities controlled by him.[1] In the district court Mosineee Paper charged that Rondeau had violated section 13(d) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78m(d), known as the Williams Act.[2] Rondeau conceded the violation of section 13(d),

[1] These consist of corporations and business associations owned or operated by Rondeau: Mosinee Cold Storage, Inc.; Francis Rondeau, Incorporated; Wausau Cold Storage Company, Incorporated; Rondeau Foundation; Rondeau & Company; George Rondeau, First Wisconsin National Bank of Wausau; and First Wisconsin National Bank of Milwaukee. In addition, Rondeau's son, George Rondeau, is a defendant to the instant action.

[2] Section 13(d) reads as follows:

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be sc registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other con-

(Footnote continued)

admitting that he had purchased eight percent of the issued and outstanding common stock of Mosinee Paper during a period of four months without timely filing a Schedule 13D as required by section 13(d).

(Footnote continued)

sideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) If the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

(E) information as to any contracts, arrangements or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or under-

(Footnote continued)

Mosinee Paper is a Wisconsin corporation, mainly engaged in manufacturing and selling paper products. Its principal place of business is located at Mosinee, Wisconsin. The company's only class of equity security, registered pursuant to section 12 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78l, is common stock, of which there were 806,177 shares outstanding as of August 31, 1971.

(Footnote continued)

standings have been entered into, and giving the details thereof.

(d)(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(d)(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(d)(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(d)(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears

(Footnote continued)

Rondeau made his first purchase of Mosinee Paper stock on April 5, 1971. By May 17, 1971 he had acquired 40,309 shares, some in his own name and some in the names of his controlled corporations and other entities. This number was more than five percent of Mosinee Paper's common stock outstanding.

The Williams Act required him to file with the Securities and Exchange Commission and mail to Mosinee Paper a 13D schedule as of May 27, 1971. Rondeau failed to file

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(Footnote continued)

to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(d)(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of any equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control or the issuer or otherwise as not comprehended within the purposes of this subsection.

the schedule. He continued to acquire Mosinee Paper stock and by August 4, 1971 his acquisitions totaled 66,577 shares, about eight percent of Mosinee Paper's stock outstanding. On August 25, 1971 Rondeau filed a 13D schedule. An amended and supplemental schedule was filed on September 29, 1971.

In the district court, although admitting his violation of section 13(d), Rondeau contended that his failure to timely file a Schedule 13D stemmed from a lack of knowledge as to the existence of the reporting requirements of section 13(d) and not from any intention to avoid the disclosure requirements of the Act and thereby assist him in an effort to covertly gain control of Mosinee Paper. Rondeau argued that his violation of section 13(d) did not warrant the imposition of any remedy or equitable relief in view of the following circumstances: He unknowingly and unintentionally failed to file a Schedule 13D; his purchase of eight percent of the common stock was for investment purposes, not control; he did not formulate an intention to seek control of Mosinee Paper until after he was informed by his attorney in early August of the filing requirement under section 13(d); and he filed a Schedule 13D within a reasonable time after learning of his duty to file. The district court agreed with Rondeau's contention that despite his admitted violation of section 13(d) the grant of equitable relief was inappropriate under the circumstances. We take an opposite view.[3]

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[3] Mosinee Paper raises an additional issue challenging the adequacy of Rondeau's Schedule 13D disclosure. We find Rondeau's Schedule 13D as amended on September 29, 1971 to be legally sufficient and does not contain any material misstatement of facts. Accordingly, we hold plaintiff's challenge to the sufficiency of the disclosure to be without merit.

I

Rondeau claims that his failure to timely file Schedule 13D was a mere technical violation of the Act which was cured by the subsequent late filing in August of a Schedule 13D. He contends that the curative effect of the late filing derives from the fact that the overriding purpose of the Williams Act is to provide adequate notice and information to management and shareholders regarding an individual or group seeking control of a corporation prior to a tender offer or a proxy contest. Rondeau urges that the purpose of the Williams Act has not been violated by this allegedly "technical violation" in view of the circumstances that: (1) demonstrate that his purchase of eight percent of Mosinee Paper common stock was for investment purposes, not control, and subsequent to these purchases he was informed by his attorney of the Williams Act filing requirements whereupon he filed a Schedule 13D within a reasonable period of time; and (2) at no time prior or subsequent to filing the Schedule 13D had Rondeau engaged in a tender offer or proxy contest to attain control of Mosinee Paper. It is Rondeau's contention that, absent a showing of an intentional and knowing failure to file or an intent to secure control of the corporation, the failure to timely file a Schedule 13D, of itself, does not transgress the purpose of the Williams Act.

We do not agree with Rondeau's interpretation of the Williams Act for it tends to narrow and limit the Act well short of its intended reach. The legislative history of the Act indicates that it was "designed to require full and fair disclosure" to investors with respect to any "techniques for accumulating large blocks of equity securities

of publicly held companies." 1968 U.S. Code Cong. & Admin. News, pp. 2813, 2814. Speaking directly to its intendment with regard to section 13(d) of the Act, Congress stated:

> The purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time. 1968 U.S. Code Cong. & Admin. News, p. 2818.

We agree with the Second Circuit's analysis of the Act in *GAF Corp.* v. *Milstein,* 453 F.2d 709 (2d Cir. 1971), that "the purpose of section 13(d) is to alert the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control. . . ." 453 F.2d at 717. To this observation we add what is self-evident from the language and legislative history of the Williams Act, the reporting requirements of section 13(d) apply regardless of the purchaser's purpose in acquiring the shares. The sweep of section 13(d) goes beyond the circumstances where the purchaser has formulated an intent to control, but also reaches that point when because of the size of the purchaser's holdings (having attained five percent beneficial ownership of a class of stock) and the fact that he acquired such holdings in a short amount of time, the purchaser portends the *potential* to effectuate a change in control. Under such conditions Congress has deemed it appropriate that investors and management be fully advised of this potential to effect control so that investors may evaluate and adequately assess the corporation's worth in view of the potential, while at the same time allowing management the opportunity to appropriately respond to any potential for a shift in control.[4]

Congress desired that investors and management be notified at the earliest possible moment of the potential for a shift in corporate control. To that end, acquisition of five percent of a class of stock was designated as a trigger to bring about full and fair disclosure. By failing to timely file, Rondeau effectively failed to disclose to investors and management the circumstances surrounding his potential to effect the control of Mosineee Paper while at the same time he continued to purchase securities in a market that had not been adequately apprised of such potential. Under the circumstances, Rondeau's failure to timely file was more than a mere technical violation of the Williams Act.

II

Rondeau contends that it would be improper to grant plaintiff's claim for equitable remedies in view that Mosinee Paper has suffered no harm, let alone irreparable harm by reason of his violation of section 13(d). In addi-

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[4] It is clear from the language of the Act that Congress intended to include within the scope of the reporting requirements those transactions entered into for investment purposes and not control. The Commission has the discretionary power to exempt from the provisions of section 13(d) any acquisition of securities which the Commission deems "as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer . . . ." Section 13(d)(6)(D). In such a situation, in requesting the discretionary power of the Commission, the burden is on the acquirer of securities to establish through objective data that his acquisition is solely for investment purposes and does not possess the potential to influence the control of the issuer.

tion, Rondeau urges that granting the relief claimed by Mosinee Paper would run contrary to the design of the Williams Act to avoid "tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." 1968 U.S. Code Cong. & Admin. News, p. 2813.

Addressing ourselves to Rondeau's first assertion, we are of the view that having transgressed the Williams Act, Rondeau has indeed harmed Mosinee Paper; that is, pursuant to section 13(d)(1) Mosinee Paper as issuer was entitled to receive a timely filed Schedule 13D. To the extent that the schedule was filed late, Mosinee Paper was harmed for it did not timely receive the relevant information surrounding Rondeau's potential to effect control and was delayed in its efforts to make any necessary response to that potential. Moreover, Mosinee Paper need not show irreparable harm as a prerequisite to obtaining permanent injunctive relief in view of the fact that as issuer of the securities it is in the best position to assure that the filing requirements of the Williams Act are being timely and fully complied with and to obtain speedy and forceful remedial action when necessary.[5]

We disagree with Rondeau's contention that a grant of relief to Mosinee Paper would tip the balance in favor of management thereby creating a weapon to be utilized by an alleged entrenched and inefficient management. The

[5] The plaintiff's position as prime enforcer of the Act emanates from the fact that a corporation has a continuous and ongoing interest in the identity and composition of its ownership and has the necessary resources, financial and otherwise, to assure compliance with the Act and to seek remedial relief where the provisions of the Act have been violated.

plaintiff seeks in the instant action to vindicate its statutory right to full and timely disclosure of the circumstances surrounding the potential to effect a change of control in its ownership and operations. Moreover, as previously indicated, Mosinee Paper is in a superior position to safeguard the interests of the investing public to assure that the market is receiving adequate and timely disclosure of relevant information required to be reported by section 13(d). Accordingly, in view of the investing public's interest and the right vested in Mosinee Paper to timely disclosure, we do not perceive this as a case where the scales would be tipped in favor of management in the event equitable relief is granted to remedy a clear violation of the terms and purposes of the Act.

III

Having considered all the circumstances concerning Rondeau's violation of section 13(d)—giving effect especially to the district judge's findings that "Mr. Rondeau and the other defendants did not engage in intentional covert, and conspiratorial conduct in failing to timely file the 13D schedule" and was unaccompanied by a tender offer or proxy solicitation—we instruct the district court enter a decree enjoining Rondeau and his associates from further violations of section 13(d) and that the 26,268 shares, representing three percent of Mosinee Paper common stock purchased between the due date of the Schedule 13D and prior to its actual filing, not be permitted to be voted with respect to any takeover, proxy contest, or vote for officers and membership on the board of directors for a period of five years. We deem such an injunctive decree appropriate to neutralize Rondeau's violation of the Act and to deny him the benefit of his wrongdoing. *Bath Indus-*

tries, Inc. v. *Blot,* 427 F.2d 97, 113 (7th Cir. 1970); *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.,* CCH Fed. Sec. L. Rep. '72-'73 Decisions ¶ 93,816 at p. 93, 518 (2d Cir. 1973).

The summary judgment in favor of the defendants is reversed, and the cause is remanded for further proceedings consistent with this opinion. Costs on appeal are assessed against the defendants.

PELL, *Circuit Judge,* dissenting. The basic issue presented to this court on appeal is whether the district court erred in granting summary judgment to the defendants. The plaintiff, in the conclusion to its original brief, asserts that the "erratic, inconsistent responses to deposition questions both as between witnesses and by the same witness (Mr. Rondeau) renders it impossible to determine the facts and the appropriate scope of the relief to be granted without live testimony and cross-examination." The majority opinion finds in effect no necessity for any evidentiary hearing but, presumably taking the facts as found by the district court, it reverses that court and directs the entry on remand of a remedial injunction, which, because of the implicit acceptance of the district court's factual findings, can only have been based upon a highly technical violation of the Williams Act, one which I cannot conceive justifies the harsh injunctive penalty to be inflicted.

The Williams Act by its terms does not provide any penalties for its violation, nor does it mandate any civil remedy. While I would not gainsay that the courts may properly fashion a remedy for a violation of the Act, I do not conceive that Congress intended that the punishment should do otherwise than fit the crime. Therefore, assuming there was no genuine issue of material fact presented to the district court, a separate issue which does cause me concern, I am unable to concur in the result reach by the majority. Accordingly, I respectfully dissent.

The majority, by directing the entry of an injunction against the defendants, indicates that for the purpose of the disposition of this appeal it can be taken that there is no genuine issue of material fact requiring a further evidentiary hearing. Assuming that posture, at least *arguendo,* I therefore turn to the facts. These are adequately set forth in the detailed opinion of the district court and need not be repeated, except as pertinent, here. *Mosinee Paper Corporation* v. *Rondeau,* 354 F. Supp. 686 (W.D. Wis. 1973).

Upon completion of an analysis of those facts, and there is no question that the defendants technically violated the Act in that they did purchase more than 5% of plaintiff's outstanding common stock without filing the requisite Schedule 13D on a timely basis, I am left with the conviction that the majority decision stripped to its essentials is that the management interests of a corporation can cause the enjoining for a substantial period of time of a shareholder's ordinary rights in all stock purchased between the date the purchases exceed 5% and the date the 13D Schedule is filed, irrespective of motivation, irrespective of irreparable harm to the corporation, and irrespective of whether the purchases were detrimental to investors in the company's stock. The violation timewise is apparently all that is needed to trigger this result. I do not conceive that this was the purpose of the Act.

I agree with the statement in the majority opinion that the "reporting requirements of section 13(d) apply re-

gardless of the purchaser's purpose in acquiring the shares." But the violation is conceded by all concerned. We are instead confronting the matter of remedy and indeed whether any remedy is appropriate or needed.

The plaintiff below apparently regarded issues as significant which the majority opinion finds are of no consequence. Thus, plaintiff contended that there was a genuine issue of material fact in dispute as to whether defendants' conduct (i.e., their motivation) was intentional, covert, and conspiratorial. 354 F. Supp. at 692. The majority opinion is willing to assume that it was not. The plaintiff alleged in its complaint and claims on appeal irreparable harm. 354 F. Supp. at 693. The majority opinion seems to find harm, although not categorizing it as irreparable, but states that in any event the plaintiff need not show irreparable harm as a prerequisite to obtaining permanent injunctive relief.

As I read the majority opinion, the rationale for this conclusion is along the line that the issuer of the stock is serving in the capacity of a private attorney general to assure that the filing requirements of the Act are met. I would not quarrel with the right to institute litigation for this purpose. "[T]he issuer has not only the resources, but the self-interest so vital to maintaining an injunctive action." *GAF Corporation* v. *Milstein,* 453 F.2d 709, 719 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972). In speaking of this, however, we are dealing with the matter of standing. In the present appeal, on the other hand, we are past that threshold issue and are concerned with the appropriateness of a remedy for a violation of the Act. Certainly here the standing was not being exercised for the purpose of securing the filing of the 13D Schedule. That schedule was filed on August 25, 1971, and the present action was not brought until September 2, 1971.

Before looking further at the facts, which apparently the majority accepted as they were found to be by the district court, it is well to recall that we are considering the propriety of the use of an equitable remedy, the injunction. In so doing we start with the cardinal principle that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres* v. *Westover,* 359 U.S. 500, 506-7 (1959). (Footnote omitted.) I am unaware of any reason for lowering the standards in the use of the injunction and agree with Judge Doyle's observation of what the law is in this respect:

> "Although one court has stated in dicta that the absence of irreparable harm does not necessarily preclude injunctive relief where the public interest is involved . . . . , Sisak v. Wings & Wheels Express. Inc., 1971 CCH Fed. Sec. L. Rep. § 92, 991 at 90, 670 (S.D. N.Y. 1970), other courts have expressly stated that a finding of irreparable harm is a prerequisite to injunctive relief. *See* Ozark Air Lines, Inc. v. Cox, 326 F. Supp. 1113, 1118-1119 (E.D. Mo. 1971)." 354 F. Supp. at 694-5.

This court in *Bath Industries, Inc.* v. *Blot,* 427 F.2d 97, 113 (7th Cir. 1970), after carefully analyzing the facts before it, observed that "we cannot say that the court erred in finding that irreparable harm would be done to [the issuer] and its stockholders unless defendants were enjoined from now proceeding with their plan . . . ." I do not find the basis for such a statement as to irreparable harm in the present case, certainly not on the basis of the facts before the court in the summary judgment disposition. In *Bath,* as Judge Doyle demonstrates so clearly in distinguishing it, 354 F. Supp. at 695, "irreparable injury to the corporation, as distinguished from its present man-

agement, flowed from the covert conduct of the defendants, who secretly accumulated stock and solicited allies so that at the appropriate time they could confront management with a *fait accompli.*" (Emphasis in the original.)

Turning to the facts of the present case as contained in the district court's opinion, I note the following which I would deem to be of significance in determining the necessity of the injunctive relief directed by the majority opinion.

Francis Rondeau, who was the moving force of the defendants, determined in the early months of 1971 that plaintiff's stock would be a good investment because it was underpriced. He made his first purchase of 500 shares early in April of that year. The president and the board chairman of plaintiff both learned in the same month of several purchases by Rondeau. When the company records showed that the holdings of defendants, the associational identity of which was known to plaintiff, had reached 18,000 shares, plaintiff's president called Rondeau by telephone and inquired as to his purpose in purchasing the stock. Rondeau stated that he felt the stock was underpriced and was a good investment; that he intended to continue to purchase shares and might acquire up to 40,000 shares (under 5% of the outstanding stock); and that he was "perfectly happy with the operation."

Unless we draw an inference from the slim basis of the statement that he was going to buy less than 5% of the stock, an inference I do not deem this court on appeal may properly draw for purposes of fashioning a remedy, we would not be able to say that the record refutes the good faith of Rondeau's statement to the company president.

During 1971, a company which provided management, accounting, and investment services to the majority share-

holders of plaintiff kept a cumulative total of acquisitions by Rondeau which were reported to the board chairman of the plaintiff. Rondeau did not know that he was required to file a Schedule 13D when his holdings exceeded 5% until he consulted his attorney on the matter about July 30, 1971, immediately after receiving a letter from the plaintiff's board chairman stating that Rondeau's activities in plaintiff's stock may have created problems under the federal securities laws.

Thereafter, Rondeau had his accountants work continuously to provide the information needed for the Schedule 13D. He placed no further orders for plaintiff's stock at any time after July 30, 1971. Rondeau had been advised in the past that he did not need to file anything with the SEC until his stock holdings in any one company exceeded 10%, and this indeed had been the law until December of 1970, when the Act was amended to lower the requirement from 10% to 5%. As a matter of fact, the plaintiff's board chairman was also unfamiliar with the requirement of the Williams Act until a few days before he wrote the letter to Rondeau on July 30, 1971.

Moreover, Rondeau's acquisitions were not secretive. It was common knowledge, "street talk" among brokers, bankers, and businessmen in the community, that Rondeau was purchasing plaintiff's stock in substantial quantities.

There was no concrete evidence in the record warranting a finding that Rondeau seriously considered obtaining control of plaintiff corporation prior to August 1971.

In the Schedule 13D filed August 25, 1971, it was indicated that defendants *at that time* were considering a tender offer. A few days after receipt of this schedule, plaintiff wrote to each of its shareholders and issued a

press release calling attention to the statement that a tender offer was being considered by the Rondeau interests.

I cannot do otherwise than to agree with Judge Doyle on the basis of the facts as established by him, which are not disputed by the majority opinion, that there was no basis for a determination of irreparable injury to the plaintiff. To grant an injunction on the sole basis of a belated filing appears to me to be exalting form over substance, to be bringing an artificial and unduly restrictive sanction into the law of securities, and to be ignoring the real purpose of the Williams Act, which "was designed for the benefit of investors and not to tip the balance of regulation either in favor of management or in favor of the person seeking corporate control," *GAF Corporation, supra* at 717 n. 16, particularly in the situation when corporate control had not yet been an objective at the time of the unreported acquisitions. In sum, without irreparable harm being shown injunctive relief is not warranted.

The stultifying effect of too rigid an application of remedies in the present area is illuminatively set forth in Comment, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. Rev. 991 (1973). The Comment is devoted to the impact of judicial decisions regarding the disclosure requirements on tender offers; its introductory observations are pertinent to our present question (at 991-92):

> "A cash tender offer is 'a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price.' It is the only realistic means by which a person or group can acquire corporate control when opposed by hostile management. In the favorable economic and legal environment of the 1960's, the cash tender offer became

> a favorite tool of companies seeking diversification or profitable investments; the inevitable advent of federal regulation, in the form of the Williams Act disclosure requirements, did not dampen its dramatic growth. In 1973, however, courts began to show an increasing tendency to use disclosure requirements to halt and destroy contested cash tender offers—a tendency so pronounced that cash tender offers, at least when contested by incumbent management, may soon become extinct.
>
> "This imminent extinction is not deliberately contrived; it is the work of well-meaning courts which strive only to protect shareholders called upon to tender their securities. In protecting them, however, courts have demanded unrealistically high standards of disclosure about the offer. In shaping relief, moreover, courts have inadvertently failed to preserve the delicate balance necessary for the tender offer's survival. As a result, even if the violation is slight and easily cured, the offer almost always dies, never to be resurrected." (Footnotes omitted.)

In the present case, we have an even weaker situation than that contemplated in the Comment. Here, there had been acquisition of an amount of stock less than the amount originally required under the Act for reporting, one immeasurably removed from any realistic potential for control, and an acquisition found to be based solely on investment purposes. Section 13(d)(1)(C) requires the person filing to disclose any intention to acquire control. At the time the 5% was exceeded, there would have been nothing to report except the meagre facts of the acquisition and the source of the funds used.

Persons purchasing stock as an investment because it is underpriced rapidly lose interest when when the latter status disappears as it ordinarily does when a tender offer or proxy fight emerges. That the purpose of the Act

was to protect the shareholders by affording them notice of the prospect of an artificially induced price resulting from a struggle for control rather than being directed at the mere investor is reflected in Section 13(d)(6)(D), which empowers the commission to exempt any acquisition or proposed acquisition "as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purpose of this subsection."

I am further concerned by the far reaching scope of the injunction directed to be entered by the majority opinion. The restriction against voting the 26,268 shares is not directed against Rondeau or his associates but is apparently to be applied on an *in rem* basis to the stock itself. Further this taint is to be for a period of five years without specification of the effective beginning date, which would mean that if it is to run for five years from the date of the entry of the injunction at least some of the normal perquisites of the shares would have been neutralized for a total of nearly eight years.

The discussion to this point has been predicated upon the facts as stated by Judge Doyle, as to which the majority opinion expressed no question of correctness. On that basis, I would dissent from the opinion for the reasons stated.

I nevertheless have a serious reservation as to the propriety of affirmance. The problem, not an uncommon one at the appellate level, is the propriety of the granting of summary judgment when one party vigorously argues the existence of a dispute as to issues of material fact. The problem is not made easier of solution by the use of findings in the district court opinion. This court has observed in other cases that the use of findings is "ill advised since

it would carry an unwarranted implication that a fact question was presented." *General Teamsters, Chauffeurs & Helpers Union* v. *Blue Cab Co.*, 353 F.2d 687, 689 (7th Cir. 1965). I am convinced, however, that the district court intended nothing more than to state what the uncontroverted facts were for decision.

A second aspect of the problem is that if the determination of the motion for summary judgment required the trial court to choose between conflicting possible inferences from the evidence, the motion should not have been granted. *Sarkes Tarzian Inc.* v. *United States,* 240 F.2d 467, 470 (7th Cir. 1957). Inferences, however, have to be drawn not from vaporous supposition but from facts established in the record. The parties had a full opportunity to develop that record, and the plaintiff deposed without success those who would have been able to have placed Rondeau in the position of covertly attempting to wrest control if such had been his intention at the time of acquisition.

While the question may be a close one, the well reasoned opinion of Judge Doyle, cast in the light of the purpose of the Act, persuades me that summary judgment was proper. While the standards of whether a summary judgment should be granted should not vary according to the type of the case, nevertheless, since "in too many situations, target management is pursuing its own interests to the exclusion of those of the investors," Comment, *The Courts and the Williams Act: Try a Little Tenderness, supra* at 1018, the investing public does have an interest in prompt disposition of the challenges arising in the factual situation here presented, an object lending itself to accomplishment by the summary judgment route.

That gamesmanship is becoming the order of the day in the area of acquisition-for-control of securities law is illustrated by a recent Second Circuit opinion, *Missouri Portland Cement Company* v. *Cargill, Incorporated,* ..... F.2d ....., (Docket Nos. 74-1024 and 74-1025, June 10, 1974), in which Judge Friendly speaking for the court stated:

> "This appeal illustrates the growing practice of companies that have become the target of tender offers to seek shelter under § 7 of the Clayton Act, 15 U.S.C. §18. Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust violation has been shown. Such cases require a balancing of public and private interests of various sorts. Where, as here, the acquisition would be neither horizontal nor vertical, there are 'strong reasons for not making the prohibitions of section 7 so extensive as to damage seriously the market for capital assets, or so broad as to interfere materially with mergers that are pro-competitive in their facilitation of entry and expansion that would otherwise be subject to serious handicaps.' These reasons are especially compelling when the target company fails to show that the alleged antitrust violation would expose it to any readily identifiable harm." Slip opinion at 4050-51 (footnote omitted).

In connection with a claimed Williams Act violation, Judge Friendly observed:

> "Courts should tread lightly in imposing a duty of self-flagellation on officers with respect to matters that

> are known as well, or almost as well, to the target company; some issues concerning a contested tender offer can safely be left for the latter's riposte." Slip opinion at 4088 (footnote omitted).

Subsequent to oral argument in this cause, counsel brought to the attention of the court a per curiam order of the Eighth Circuit in *Tri-State Motor Transit Co.* v. *National City Lines,* No. 73-1867 (April 4, 1974). That court affirmed the district court's granting of a summary judgment motion to a defendant charged with a section 13(d) violation of failure to file, which motion was granted on the ground that the stipulated facts revealed no deliberate covert and conspiratorial noncompliance with the requirements of 13(d). In affirming, the court of appeals stated that injunctive relief was not warranted, citing Judge Doyle's opinion in the present case. Inasmuch as the Eighth Circuit order, although apparently a case of first impression on the present issue at the appellate level, was, under the rule of that circuit, an unpublished order not to be cited, and because of the lack of any factual development in the order, I have not relied upon the case as authority. I do note the case, however, because its disposition as contrasted with that in the majority opinion in the present case suggests the possibility of a split of authority between circuits.

For the reasons herein indicated, I would affirm the judgment of the district court.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.